

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of YVONNE HAMPTON and U.S. POSTAL SERVICE,
POST OFFICE, Pembroke Pines, Fla.

*Docket No. 97-283; Oral Argument Held December 18, 1997;
Issued August 11, 1998*

Appearances: *Angela V. Greene*, for appellant; *Catherine P. Carter, Esq.*, for
the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for further merit review of her claim.

On December 15, 1986 appellant, then a 27-year-old letter carrier, filed an occupational disease claim alleging that she sustained a right shoulder strain due to carrying a heavy mailbag. The Office accepted appellant's claim for a right shoulder strain.¹

In an undated letter, received by the Office on October 26, 1992, appellant gave a different history of her injury. She stated that one day in September 1986 she was carrying a heavy mailbag when it slipped from her shoulder, throwing her to the ground. She stated that her "shoulder bone was up" but she got up and put the mailbag back on her shoulder and the weight of the bag pushed the bone back down. Appellant stated that she was in great pain but was afraid to tell her supervisor of the incident because she was in the probationary stage of her employment and felt that she might be terminated. She stated that she sought treatment from a Dr. Harris but continued to work. Appellant stated that she continued to have pain and consulted other physicians in an effort to find relief, including a neurologist, but continued to experience pain.

In a report dated December 22, 1986, Dr. Ronald E. Harris, a family practitioner, related that appellant sustained a right shoulder strain approximately eight weeks previously, described his course of treatment, and noted that he had referred appellant to a chiropractor.

¹ The Board notes that the original file for the 1986 injury was inactive for several years and was retired and then destroyed. In February 1993 the case was reconstructed.

In a report dated December 24, 1986, Dr. Kenneth W. Osborne, a chiropractor, related as the history given to him by appellant that she sustained an accident at work on September 28, 1986 while she was delivering mail. He related that she was carrying a mailbag and injured her right shoulder and neck. Dr. Osborne stated that an x-ray of the cervical spine revealed a straightening of the normal cervical lordotic curve.

In a report dated November 11, 1988, Dr. Basil M. Yates, a Board-certified neurosurgeon, related that in September 1986 appellant was carrying a heavy mailbag when it slipped off her shoulder and she was told that it pushed up a bone in her shoulder. He related that a chiropractor treated appellant for a lumbar sprain and a dislocated shoulder. Dr. Yates provided findings on examination and opined that there was no objective evidence of neurological impairment at that time but recommended further testing.

In a report dated April 19, 1989, Dr. Yates indicated that appellant's right shoulder injury occurred on September 11, 1986² when her mailbag dropped from her shoulder and was acknowledged on December 15, 1986.

In a report dated November 13, 1989, Dr. Roger E. Kelley, a Board-certified neurologist of professorial rank, related that appellant had experienced chronic right shoulder pain and a burning and tingling sensation in the right shoulder commencing on December 15, 1986. He related as the history of the incident that a heavy mailbag caused her to be thrown down to the ground and caused a shoulder separation. Dr. Kelley related appellant's course of treatment and provided findings on examination. He stated that he had questions about possible embellishment of her history because she complained of chronic excruciating pain since December 15, 1986 but took only aspirin. Dr. Kelley stated that it was possible that appellant could have a cervical reflex sympathetic dystrophy and he was referring appellant to a pain specialist.

In a report dated June 28, 1990, Dr. Kelley related that on June 16, 1990 appellant's pain was so severe that she sought treatment at a hospital emergency room. He provided findings on examination and stated that he continued to be perplexed concerning the nature of appellant's pain syndrome. Dr. Kelley stated that it was an atypical form of neuralgia and might fall into the reflex sympathetic dystrophy category.

In a report dated November 11, 1990, Dr. Kelley provided findings on examination and stated that he was not sure what was causing appellant's pain. He stated that it was possible that the pain was musculoskeletal in origin or possibly a case of reflex sympathetic dystrophy.

In a report dated May 24, 1991, Dr. Chester J. Janecki, Jr., a Board-certified orthopedic surgeon, related as the history of appellant's condition that she experienced right shoulder pain "after falling over holding a mailbag at work." He noted that appellant continued to have pain in her shoulder.

² At the oral hearing in this case, appellant stated that Dr. Yates was confusing the date of the right shoulder injury with a hand injury that she sustained on September 11, 1987. The Board notes that Dr. Yates' report does reflect a notation of a September 11, 1987 hand injury.

A magnetic resonance imaging scan report dated May 28, 1991 regarding appellant's right shoulder indicated that appellant had supraspinatus tendinitis without evidence of rotator cuff tear and a probable synovial cyst adjacent to the superior labrum. The history given was that appellant had a history of trauma to the shoulder.

In a report dated July 1, 1991, Dr. Kelley related that the previous week appellant was struck by lightning while in her kitchen and had a shock-like sensation from her hand to her left shoulder and a tingling discomfort in her right shoulder.

In a report dated November 18, 1991, Dr. Kelley related that appellant had felt no significant improvement in her right shoulder and that she continued to experience recurrent severe pain in the right shoulder region radiating into the cervical region.

Dr. Kelley continued to submit reports relating appellant's right shoulder problems.

In a report dated September 28, 1992, Dr. Kelley related that appellant's right shoulder pain began after a shoulder dislocation in 1986. He provided findings on examination and opined that appellant's condition was causally related to the 1986 incident.

In a form dated January 20, 1993, appellant alleged that she sustained a recurrence of disability which she attributed to her December 15, 1986 employment injury.

In a report dated November 1, 1993, Dr. Kelley related that appellant's right shoulder pain was essentially unchanged. He noted that appellant had undergone sympathetic blocks which had a positive effect on her symptoms and that this supported reflex sympathetic dystrophy as the explanation for her severe pain syndrome.

By decision dated March 22, 1994, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that she sustained a recurrence of disability causally related to her December 15, 1986 employment injury.

By letter dated April 6, 1994, appellant, through her representative, requested an oral hearing before an Office hearing representative.

In an October 19, 1994 report, Dr. Kenneth C. Fischer, a Board-certified neurologist, related that appellant was being treated for a possible reflex sympathetic dystrophy and had been examined by Dr. Larry Empting, a noted pain care specialist. He related that Dr. Empting felt, based on his examination, that appellant most likely had a stretch injury to the brachial plexus with a secondary myofascial component and that he did not believe that appellant had reflex sympathetic dystrophy.

On March 23, 1995 a hearing was held before an Office hearing representative at which time appellant testified that in September 1986 she was carrying a heavy mailbag which slipped away from her shoulder, throwing her to the ground and her shoulder bone popped up. She testified that she placed the mailbag back on her shoulder and pulled her arm around until the bone popped down. Appellant testified that she did not report the incident in September 1986 because she was afraid that she would lose her job since she was still on probation. She stated

that she consulted Dr. Harris in October 1986³ and subsequently other physicians but continued to have pain. Appellant stated that the incident when she was struck by lightning was not the first time that she reported a tingling sensation in her shoulder. She noted that she reported this tingling sensation to Dr. Kelley on November 13, 1989. Regarding Dr. Kelley's statement in his November 13, 1989 report that there might be "embellishment" of the history of the condition, appellant noted that in none of Dr. Kelley's succeeding medical reports did he indicate any doubt regarding the history as given by appellant. Regarding Dr. Yates' November 11, 1988 report, appellant testified that his statement that she "was told" that the mailbag had pushed a bone up in her shoulder was not correct, that she had told him that she, herself, knew that the bone had been pushed up and had not been told this by anyone. Appellant stated that Dr. Yates never actually examined her regarding her injury and merely asked her to perform some movements while he dictated observations into a tape recorder.

By decision dated June 21, 1995, the Office hearing representative affirmed the Office's March 22, 1994 decision.

By letter dated June 1, 1996, appellant, through her representative, requested reconsideration of the Office's denial of her claim. Appellant argued that the Office erred in its development of the evidence in appellant's claim and that the Office hearing representative erred in his recitation and analysis of the evidence in his June 21, 1995 decision. Appellant argued that the Office erred in developing the claim as a recurrence of disability claim rather than as a consequential injury claim; that the hearing representative erred when he concluded that Dr. Fischer's January 13, 1995 report offered a "different history of injury"; erred when he discounted Dr. Fischer's January 13, 1995 report; erred by not accepting appellant's clarification at the oral hearing concerning Dr. Kelley's comment in his first report; erred when he failed to consider that appellant had been diagnosed with reflex sympathetic dystrophy; erred in disallowing the claim; and erred when he failed to consider approval of appellant's application for retirement disability by the Office of Personnel Management (OPM).⁴

By decision dated August 20, 1996, the Office denied reconsideration on the grounds that the evidence submitted was found to be of repetitious nature and irrelevant and not sufficient to warrant review of the prior decision.

The Board finds that the Office did not abuse its discretion by declining to reopen appellant's case for further consideration of the merits.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁵ As

³ There is no October 1986 report from Dr. Harris of record. However, as noted earlier, the original file for this case was destroyed and the file was later reconstructed.

⁴ Appellant submitted a copy of a Social Security Administration decision dated March 29, 1996 in which the administrative law judge found that appellant was disabled within the meaning of the Social Security Act. The administrative law judge noted in the decision that the federal OPM had determined that appellant was entitled to disability retirement benefits.

⁵ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

appellant filed her appeal with the Board on October 9, 1996, the only decision properly before the Board is the Office's August 20, 1996 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's March 22, 1994 or June 21, 1995 decisions denying appellant's claim for a recurrence of disability.⁶

Under section 8128 of the Act,⁷ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,⁸ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or a fact not previously considered by the Office,
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁹

In this case, appellant requested a reconsideration of the denial of her claim and argued that the Office erred in its development of the evidence and that the hearing representative erred in his analysis of the claim.

Appellant argued that the Office erred in developing the claim as a recurrence of disability claim rather than as a consequential injury claim. However, regardless of whether the claim was developed as a recurrence of disability case or a consequential injury case, the burden of proof remains with appellant to provide sufficient rationalized medical evidence to establish that her disability is related to her employment.¹⁰ In this case, appellant's claim was accepted, based on her occupational disease claim, for a right shoulder strain. The first medical evidence to note appellant's history of a shoulder bone dislocation was Dr. Yates' November 1988 report, provided two years following the accepted strain injury. Therefore, this argument does not have a reasonable color of validity and is insufficient to warrant further merit review.

Appellant argued that the hearing representative erred when he failed to consider the social security claim decision and approval of appellant's application for retirement disability by

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

⁷ 5 U.S.C. § 8128.

⁸ 20 C.F.R. § 10.138(b)(1).

⁹ 20 C.F.R. § 10.138(b)(2).

¹⁰ *See Sandra Dixon-Mills*, 44 ECAB 882 (1993).

OPM. The April 2, 1991 decision of an administrative law judge finding that appellant was disabled under the Social Security for purposes of receiving Supplemental Security Income and the OPM disability retirement action has no dispositive value in this case because, as the Board has held, entitlement to benefits under one federal act does not establish entitlement to benefits under the Federal Employees' Compensation Act. In determining whether an employee is disabled under the Act, the findings of another federal agency are not determinative of disability under the Act. The Act and the statutes of other agencies have different standards of medical proof on the question of disability. Therefore, disability under one statute does not establish disability under the other statute.¹¹ Therefore, this argument is not sufficient to warrant further merit review of the case.

Appellant contended that the hearing representative erred when he failed to consider that she had been diagnosed with reflex sympathetic dystrophy, a chronic pain disorder. While the record shows that a possible reflex sympathetic dystrophy has been discussed in several medical reports, most recently the October 19, 1994 report of Dr. Fischer, a Board-certified neurologist of professorial rank, he stated that Dr. Empting, a pain specialist to whom he had referred appellant, had concluded that she did not have reflex sympathetic dystrophy. Therefore this argument is not sufficient to warrant further merit review of the case.

Appellant argued that the hearing representative erred when he disallowed her claim based on a lack of objective findings. The Board notes that a magnetic resonance imaging scan report dated May 28, 1991 regarding appellant's right shoulder indicated that appellant had supraspinatus tendinitis without evidence of rotator cuff tear and a probable synovial cyst adjacent to the superior labrum. Also, in a report dated December 24, 1986, Dr. Osborne, a chiropractor, stated that an x-ray of the cervical spine revealed a straightening of the normal cervical lordotic curve. As these relate to conditions not accepted by the Office as employment related, the Board finds that appellant's contention is not relevant to her accepted right shoulder strain.

Appellant also argued that the hearing representative erred when he concluded that Dr. Fischer's January 13, 1995 report offered a "different history of injury," in that the physician noted a history of a shoulder dislocation in 1986. The Board notes that there are reports from several physicians in which appellant provided a history of a shoulder dislocation. In a report dated November 11, 1988, Dr. Yates, a Board-certified neurosurgeon, related that in September 1986 appellant was carrying a heavy mailbag when it slipped off her shoulder and she was told that it pushed up a bone in her shoulder. He related that a chiropractor treated appellant for a lumbar sprain and a dislocated shoulder. In several reports, Dr. Kelley related that appellant had experienced chronic right shoulder pain and related the history that a heavy mailbag on her caused her to be thrown down to the ground and caused a shoulder dislocation in 1986. However, the medical evidence most contemporaneous to the 1986 injury, the reports of Dr. Harris, do not indicate there was any shoulder dislocation as has been alleged by appellant subsequent to that period of medical treatment. For this reason, appellant's contention on appeal does not have a reasonable color of validity. Appellant has not established the factual occurrence of a shoulder separation and her contentions regarding the weight given Dr. Kelley's

¹¹ See *Daniel Deparini*, 44 ECAB 657 (1991); *Hazelee K. Anderson*, 37 ECAB 277 (1986).

reports by the Office hearing representative are not sufficient to require the Office to reopen the claim for merit review.

The decision of the Office of Workers' Compensation Programs dated August 20, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 11, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member